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Do we have a new “apartheid” from Israel versus Occupied Palestinian Territory according to the rules of international criminal law?

DOI:10.5281/zenodo.17406793

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Abstract: This paper seeks to investigate and answer the question, from a theoretical perspective, whether the Israeli government's legal or non-legal policies in the occupied Palestinian territory constitute and provide the evidentiary basis for the crime of apartheid. The assertion of apartheid within a conventional or non-conventional legal and doctrinal framework concerns the elements of apartheid and remains within the general outline of this crime. The International Court of Justice, in its advisory paper of 19 July 2024, which highlighted Article 3 of the Convention on the Elimination of All Forms of Racial Discrimination, did not reach a final conclusion. There are many gaps, and the importance of a legal analysis, from an objective perspective, seems especially important after the continuous attacks by Hamas in recent months and especially after October 2023 with the ongoing conflict in Gaza. Apartheid, as an

international crime, is linked to individual criminal responsibility and the legal framework based on Article 7, paragraph 2, letter h) of the Statute of the International Criminal Court, which takes into account several important elements. These include inhumane acts, the regime of oppression resulting from systematic domination of a racial group or any other racial group, and the intention to maintain such a regime. The elements of the Statute of the ICC cover this living situation, but they are difficult to prove. What remains important, while establishing in a general and imprecise manner a probable evidence, is apartheid, which deduces the context of a conduct for the area under investigation. An area that has been writing its own legal history for years without a precise solution for either party.

Keywords: crime of apartheid; crime against humanity; international criminal law; individual criminal responsibility; Israel v. OPT; genocide; StICC; ICC; international jurisprudence; ICERD; prosecution; reasonable doubt.

Introduction

The topic of apartheid crime (Dugard, Reynolds, 2013; Kern, Herzberg, 2021; Reynolds, 2023; Waxman, 2023)[1] has been

1World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/CONF.189/4, (20 August 2001). World Conference

mentioned and attempted to be analyzed in various reports of the UN (Quigley, 1991; Zilbershats, 2013; Khalaf, 2017; Gross, 2017; Lingaas, 2019; Kern, 2021; Baldwin, Max, 2021; Addameer, International Human Rights Clinic Harvard Law School (IHRC), 2022; Aizenberg, 2022a; Aizenberg, 2022b; Odeh, 2022; B'Tselem, 2022; Amnesty International, 2022; Grote, 2022; Goldberg, 2023; Asseburg, 2023; Klug, 2023; McDermott, 2024; Keane, 2024a; Keane, 2024b; Liakopoulos, 2024b; Robinson, Vasiliev, Van Sliedregt, Oosterveld, 2024)[2],

Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Programme of Action, 5 (8 September 2002), https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf Accessed on 18.09.2025.

2John Dugard (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council", at 3, U.N. Doc. A/HRC/4/17 (28 Jan. 2007). Richard Falk (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Final Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, par. 55, U.N. Doc. A/HRC/25/67 (13 January 2014). Richard Falk (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, A/HRC/13/53/Rev.1 (7 June 2010).); Michael Lynk (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, par. 35, 52, U.N. Doc. A/HRC/49/87 (12 August 2022). Francesca Albanese (Special Rapporteur on the Palestinian Territories Occupied Since 1967), Rep. of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, par. 9, U.N. Doc. A/HRC/77/356 (21 September 2022). Richard Falk & Virginia Tilley, Israeli Practices towards the Palestinian People and the Question of Apartheid, at 65, U.N. Doc. E/ESCWA/ECRI/2017/1 (2017), which is affirmed that: "(…) Israel has established an apartheid regime that dominates the Palestinian people as a whole [and] is guilty of imposing an apartheid regime (…)". See also the: Interstate Communication submitted to the Committee on the Elimination of Racial Discrimination (CERD) on 23 April 2018. Inter-state communications: Committee on the Elimination of Racial Discrimination, U.N. Human Rights Office of the High Commissioner: https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications#:~:text=Israel,matter%20again%20to%20the%20Committee.Accessed on 18.09.2025. Makarim Wibisono, Report of the Special

as well as by a rich doctrine with various facets of investigations, research and denominations outside the classical political, legal and economic context.[3] Often, experiences and practices, especially those of Israeli policy in the Occupied Palestinian Territory (OPT), are used and exploited for further

Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, U.N. Doc. A/HRC/28/78, 22 Jan 2015; HRC, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, par. 85, U.N. Doc. A/77/328, (14 Sept. 2022). UN GA, Report of the UN Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009 (parr. 113, 206-07, 1434, 1492, 1546, 1765, 1937). ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the term "apartheid" is not even mentioned, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (9 July); ICJ's advisory proceedings on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, ICJ. And with separate opinions of judges Nolte (Separate Opinion, par. 8) and Iwasawa (Separate Opinion, parr. 12-13) against it. Judge Brant (Declaration, par. 11). See also the *ad hoc* Conciliation Commission in the State of Palestine v. Israel (set up under Art. 12(1)(b) ICERD) did not address the apartheid claim. See its findings here: CERD, Report of the Ad Hoc Conciliation Commission on the Inter-State Communication Submitted by the State of Palestine against Israel under Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. CERD/C/113/3 (2024). Sfard affirmed that: "(…) apartheid in the West Bank given that the occupation (…) cementing the Jewish "domination over the occupied [Palestinian] residents" and ensuring "their inferior status;" in addition considering Israel as an "apartheid regime" given the "creeping legal annexation" (…)". Joint Submission on Apartheid to the UN Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory), January 2022, https://www.alhaq.org/cached_uploads/download/2022/01/20/final-draft-lynk-s-apartheid-submission-1-1642656045.pdf. Accessed on 18.09.2025. Human Sciences Research Council of South Africa (HSRC), Occupation, Colonialism, Apartheid, 13, 17, 172, 271, 277 (2009): "(…) Israel exercises control in the OPT with the purpose of maintaining a system of domination by Jews over Palestinians and that this system constitutes a breach of the prohibition of apartheid (…)". Addameer affirmed that: "(…) Israel's deployment of a dual legal system in the occupied West Bank (…) civil and political rights to the rights of Jewish Israeli citizens settled in the occupied West Bank, amount to a breach of the prohibition of apartheid under international law."); Reynolds affirmed that: "(…) apartheid regime" because of systematic discrimination against "racialised group for the purpose (…) domination (…) severe violations of

analysis along with international criminal law.[4]

Each investigation is important and, above all, offers information and further insights from a legal, logical, and interpretative perspective. Indeed, each investigation seeks to shed light and fill in the gaps regarding the crime of apartheid (Gebhard, 2018), given that the term is sometimes used inappropriately (Dugard and Reynolds, 2013). We speak of apartheid when states introduce all kinds of measures relating to crime.[5] But what is most interesting is that it is connected to the OPT and the Jerusalem area (Kretzmer and Ronen, 2021; Brandes, 2022),[6] excluding Gaza.[7]

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human rights" by Israel in the OPT, amounting to "inhumane acts," criticizing "crucial distortions and omissions" in the Amnesty International report and challenging the institutionalized regime element and the intent requirement and thus concluding that the apartheid claim is "misled, if not malicious" (…)".

3Russell Tribunal on Palestine, Findings of the South African Session, parr. 5.17, 5.44-5.45 (7 Nov. 2011): https://www.russelltribunalonpalestine.com/en/wp-content/uploads/2011/11/RToP-Cape-Town-full-findings3.pdf Accessed on 18.09.2025.

4See, paragraph 4 of Falk Report 2014 that is affirmed: "(...) "more appropriate" to employ the term "Palestine" instead of OPT given G.A. Res. 67/19, 9 Nov., 2012 recognizing Palestine as a non-member observer state of the UN (…)".

5Press Release, UN Office of the High Commissioner, UN Expert Urges States to End "Vaccine Apartheid", U.N. Press Release (14 June 2022): https://www.ohchr.org/en/press-releases/2022/06/un-expert-urges-states-end-vaccine-apartheid. Accessed on 18.09.2025. UN Special Rapporteur for Afghanistan referring to "gender apartheid" as an international crime, cf. Afghanistan: Taliban 'may be responsible for gender apartheid' says rights expert, U.N. News (19 June 2023), https://news.un.org/en/story/2023/06/1137847. Accessed on 18.09.2025.

6See the 1980 Jerusalem Basic Law, Basic Law: the Knesset, SH 980 (1980)(Isr.), https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawJerusalem.pdf Accessed on 18.09.2025.

7Sadi Jaber and Bantekas affirmed that: "(…) Israel's technological superiority and the small area of Gaza as well as its proximity to Israel make "the remote exercise of effective control" possible notwithstanding Hamas's authority and armed resistance); The ICJ Advisory Opinion, The ICJ Advisory Opinion, Legal

The investigation being conducted for the OPT uses an extension of Israeli laws including the jurisprudence for civil authorities in the area under investigation (Hostovsky Brandes, 2020; Brandes, 2022; Sadi Jaber, Bantekas, 2023).[8]

The administration of the OPT is based on regulations followed by the Israeli Ministry of Defense, the military commander of the OPT and a civilian institution in Israel. There are various interpretation and application objectives regarding the area under investigation (Kretzmer, Hostovsky Brandes, 2023), as a position that has been maintained in recent months by the Israeli government.

The Israeli regime exercises sovereignty in the OPT effectively and in favor of the treatment of an annexation that has no formal basis (Cohen, Shany, 2023; Megiddo, 2023; Hostovsky Brandes, 2023; Mackenzie, 2024).[9] For many, the issue is connected to citizens of the state of Israel but also to those who live in the OPT and are therefore distinct from one another and can

Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, 2024 I.C.J. 186 (July 19).

8Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 33 (21 February 2024), (Gambia); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 38, 40 (22 Febrruary 2024) (Japan); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 13 (23 February 2024) (Norway); Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Verbatim Record, 29 (26 February 2024).

therefore speak of the crime of apartheid.

Apartheid as an international crime

When we speak of the crime of apartheid, we are referring to a crime that is linked to state responsibility (Liakopoulos, 2020b; Liakopoulos, 2020c), to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Thornberry, 2016), and in general to other crimes covered by the Statute of the ICC (StICC), especially crimes against humanity. The convention defines the crime of apartheid as a manifestation of racial discrimination.

A crime that carries individual responsibility[10] according to the Apartheid Convention of 1973.[11] From a customary law

9See the thirty-seventh government of Israel formed on December 29, 2022. Ministerial Committee on National Security Affairs. Press Release, Benjamin Netanyahu, Prime Minister, Cabinet Appoints Members of the Security Cabinet, the Ministerial Committee on the ISA, and Deputy Ministers (3 January 2023), https://www.gov.il/en/departments/news/spoke-security030123 Accessed on 18.09.2025.

10See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (G.A. Resolution 2391 (XXIII), 26 November 1968) which, in its preamble, referring to G.A. Resolution 2202 (XXI), 16 December 1966: "(…) "policies of apartheid" as crime against humanity and includes, in Art. I, "inhumane acts resulting from the policy of apartheid" in the definition of Crime against humanity. The later recognition of "practices of apartheid" as a "grave breach" by the 1977 Additional Protocol I to the Geneva Conventions (Art. 85(4)(c)) did not provide for a definition. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 85(4)(c), June 8, 1977, 1125 U.N.T.S. 3.

11G.A. Resolution 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid (18 July 1976). Art. II affirmed that: "(…) similar policies and practices of racial segregation and discrimination as practised in southern Africa" and "shall apply (…) acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them (…) inhumane acts are then

perspective, the crime of apartheid is prohibited by the International Law Commission (ILC) which accepted a relevant proposal from the special rapporteur to eliminate it as a peremptory norm under international law (Reynolds, 2013; Lingaas, 2015; Liakopoulos, 2020b).[12]

The topic seems complicated and varied as a crime from a customary point of view (Hofstra, 1981; Tomuschat, 2005; Eden, 2013; Lingaas, 2015; Mettraux, 2020; Van Den Herik,

listed as follows: Denial to a member or members of a racial group or groups of the right to life and liberty of person: -By murder of members of a racial group or groups; -By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment; -By arbitrary arrest and illegal imprisonment of the members of a racial group or groups; -Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; -Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association; -Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof; -Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour; -Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid (…)".

12ILC, Report of the ILC Seventy-Third Session, U.N. Doc. Supplement No. 10 A/77/10, at 16 (2022). Report of the Commission to the General Assembly on the work of its fifty-third session, [2001] 2 Yearbook of ILC, 62, U.N. A/CN.4/SER.A/2001/Add.1 (Part 2) (listing apartheid, together with genocide and CaH, as "composite [wrongful] acts"). Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 and Add. 1, par. 374 (2016), 14, 17, 27-8, 51, 54.

Braga da Silva, 2022; Liakopoulos, 2024a)[13] and above all by the application of the Convention which was not consistent with the general spirit of apartheid. In this spirit, we recall the StICC, which confirmed the criminal nature of its prohibition, classifying it as a crime against humanity.[14] In reality, it is a convention that has rewritten the same things we have read from the Malabo Protocol on the African Court of Justice and Human Rights.[15]

In the same spirit is the ILC (Lingaas, 2015),[16] as well as the practice that has belonged to the UN since the Second World

13ICTY, Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment of the Trial Chamber, par. 622 (ICTY 7 May 1997).

14Rome Statute of the International Criminal Court art. 7(2)(h), 17 July 1998, 2187 U.N.T.S. 90 "(…) apartheid means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime (…)".

15Protocol on the Statute of the African Court of Justice and Human Rights arts. 28C(1)(j) and (2)(h), 1 July 2008, https://au.int/sites/default/files/treaties/36398-treaty-0045-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_africa_court_of_justice_and_human_rights_e-compressed.pdf Accessed on 18.09.2025.

16ILC, Draft Articles on Prevention and Punishment of Crimes Against Human., art. 2 (1)(j) and (2)(h), U.N. Doc. A/74/10, at 12-13 (2019). In contrast, the 1991 Draft Code of Crimes against the Peace and Security of Mankind, Art. 20: "(…) apartheid (…) based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group (…)". Report of the Commission to the General Assembly on the work of its forty-third session, [1991] 2 Yearbook of ILC, 102, U.N. Doc. A/CN.4/SER.A/1991/Add.l (Part 2): "(…) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population (…)". (Report of the Commission to the General Assembly on the work of its forty-eight session [1996] 2 Yearbook ILC, 47, U.N. Doc. A/CN.4/SER.A/1996/Add.l (Part 2)): "(…) apartheid under a more general denomination," id. at 49, and in fact broader than the 1991 definition embracing "ethnical" and "religious grounds" and thus groups (…)".

War (Liakopoulos, 2022). We have the General Assembly, which has considered apartheid as racial segregation, based on racial discrimination, since 1950[17] and as a defined crime against humanity since 1965.[18] The Security Council has declared apartheid as an international crime since 1967,[19] and a crime against humanity since 1984 (Klose, 2022).[20] In the same framework are the principles of international humanitarian law, which in their practice have recognized it as a grave violation since 1977.[21]

However, ICERD and the majority of Southern countries, including the G7 states, did not participate (Lingaas, 2015) in the monitoring of the post-aparheid elections in South Africa,[22] which was suspended in 1995 (after the 1994 elections) (Kattan, Johnson, 2023). Including apartheid as a crime under the ICC Statute was not a simple matter but the result of a process of continuous negotiations that benefited South Africa by having a significant role in this decisive intervention.[23] Implementation of

17G.A. Resolution 395 (V), at 24 (2 December 1950).

18G.A. Resolution 2074 (XX), at 60-61, par. 4 (17 December 1965).

19S.C. Resolution 392, par. 3 (19 June 1976).

20S.C. Resolution 556, par. 1 (23 October 1984).

21Additional Protocol I, op. cit., art. 85(4)(c).

22International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-7&chapter=4&clang=_en. Accessed on 18.09.2025. Note that China, Russia and India are State Parties. Tomuschat stresses the lack of Western support and explains it with the overly broad provision on participation and complicity in Art. III Application Convention. U.N. GAOR, 28th Sess., 3rd Comm., 2005th meeting (24 October 1973).

23See the 3rd meeting, par. 125, U.N. Doc. A/ CONF.183/ C.1/ SR.3 (17 June 1998)) only contains a (late) statement by Mexican delegate (and now ICC judge)

the law on the crime of apartheid began after the adoption of the ICC Statute.[24] This crime falls within the jurisdiction of the court.[25] It is connected with the requirements of legality, certainty, the prohibition of analogy, principles and criminal notions. The lack of precision of such elements are part of the framework of the crime of apartheid (Ambos, 2024).

The lack of a definitive definition of the logical reasoning, especially jurisprudential, shows that we have gaps in practice in the field of apartheid. The crime was not prosecuted in post-apartheid South Africa (Kemp, Nortje, 2023).[26] This result arises because the prosecutor of the ICC does not address this crime precisely (Liakopoulos, 2022; Liakopoulos, 2024a),[27] despite the

Flores (parr. 123-26). (UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13, at 239 (July 17, 1998), https://www.legal-tools.org/doc/656f32/pdf Accessed on 18.09.2025.

24See the Commission of Experts on Terrorism, Czech Republic Criminal Code, Council of Europe (April 2007), https://rm.coe.int/ct-legislation-czech-republic-criminal-code/16806415ce Accessed on 18.09.2025 (paragraph 1 of section 263a); Penal Code of 1968 (as of 2011) of Bulgaria, International Humanitarian Law Databases, https://ihl-databases.icrc.org/en/national-practice/penal-code-1968-2011Accessed on 18.09.2025 (last viewed 25 Apr. 2024) (Article 417).

25Art. 26 of the German criminal law, (section 7(1) no. 8). International Criminal Court Act 2001, c. 17 (UK), https://www.legislation.gov.uk/ukpga/2001/17/schedule/8 Accessed on 18.09.2025. (Articles 6-9 of the ICCS in Schedule 8); Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (South Africa), https://www.justice.gov.za/legislation/acts/2002-027.pdf Accessed on 18.09.2025.(as amended by Judicial Matters Amendment Act 22 of 2005, copying Art. 6-8 ICCS in Schedule 1).

26Foundation for Human Rights and Webber Wentzel, Press Release: Historic Crimes against Humanity Indictment in COSAS 4 Case, 23 November 2021, https://unfinishedtrc.co.za/press-release-historic-crimes-against-humanity-indictment-in-cosas-4-case Accessed on 18.09.2025.

27State of Palestine, ICC. Preliminary Examination Reports between 2015 and 2020. ICC, Office of the Prosecutor, Report on Preliminary Examination Activities

detailed work of South Africa and other states (2023).[28] The customary nature of apartheid is not affirmed with certainty but is limited in nature.

The application of the crime of apartheid in the OPT occurs according to Art. 7, paragraph 2, letter h) of the ICC Statute (Ambos, 2022). In this spirit, the Palestinian side's acceptance of Art. 12, paragraph 1, is immediately recalled.[29]

The basis of the statute was the acceptance of the jurisdiction of the ICC in connection with the OPT.[30] A decision that was uncontroversial given the majority opinion that was necessary to be based on the territorial jurisdiction of the ICC. A decision regarding the territorial jurisdiction of the ICC (Ambos, 2024) allows the prosecutor to carry out further investigations into alleged crimes committed by Israeli citizens in OPT.

2020, par. 45, 215 (14 December 2020), https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf Accessed on 18.09.2025. ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2022 (1 December 2022), https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf Accessed on 18.09.2025.

28Letter from the Embassy of South Africa to the Kingdom of the Neth. to the Prosecutor of the ICC (17 November 2023), https://www.icc-cpi.int/sites/default/files/2023-11/ICC-Referral-Palestine-Final-17-November-2023.pdf Accessed on 18.09.2025 (South Africa, Bangladesh, Bolivia, Comoros and Djibouti State Party referral in accordance with Article 14 of the Rome Statute of the International Criminal Court).

29Palestine lodged the Art. 12(3) declaration on 1 January 2015, Statute entered into force on 1 April 2015 (Art. 126(2) StICC).

30Situation in the State of Palestine, Case No. ICC-01/18, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine" (5 February 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.pdf Accessed on 18.09.2025. (In favor J. Perrin de Brichambaut and Alapini-Gansou, dissenting opinion of judge J. Kovács.)

Ratione materiae and *ratione loci* dimensions of the crime of apartheid

It is immediately apparent that the crime of apartheid was linked to the situation in South Africa (Dugard, 2012). This region experienced difficult times and was linked to apartheid from the beginning of the violent situation there.

The apartheid was referred to policies of racial segregation and discrimination. Since its negotiations,[31] the Convention has sought to place greater emphasis on such a crime in South Africa by formulating a general definition that viewed the policies in the region as a standard model aimed at excessively narrowing the definition of the apartheid (Lingaas, 2015). The *ratione loci* application of the crime was not limited to the apartheid regime (Liakopoulos, 2020a).[32]

The right of occupation provided for by the Fourth Geneva Convention of 1949 has not replaced the crime of apartheid.[33]

31G.A. Resolution 3382 (XXX): "(…) right to self-determination and independence "strongly condemns all Governments which do not recognize" these rights and refers explicitly to "the people of Africa and the Palestinian people" (…)".

32Art. 3 ICERD (extending the prohibition to "territories under their [the States Parties'] jurisdiction") and from the precedent of the South African practice in Namibia. G.A. Resolution 2074, ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Report 1971, parr. 16, 129-31: "(…) South Africa is under an obligation to withdraw and UN Member States to refrain from any acts implying recognition of the legality of the occupation (…) "policy of apartheid as applied by South Africa in Namibia" (...) flagrant violation of the purposes and principles of the Charter").

33See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 287. For a recent in-depth treatment, see Jackson,

This right is assessed in each case in relation to specific elements of its prohibition. The prohibition of apartheid does not overcome the *jus cogens* character (Liakopoulos, 2020d), nor does the commission of the crime of apartheid justified by the right of occupation. This right also includes and defines different treatment of the local population, which enjoys a privileged status according to Art. 4 of the Geneva Convention.

The situation of occupation existed as a risk that the apartheid regime would be established, given the military pressure exerted by the occupier and the domination of the local population, which includes the need to protect its own population (Dinstein, 2019).

The situation in the OPT highlights an illegal situation,[34] which does not entail privileges for the occupier as happens in a sovereign territory. The specific context of Israel's occupation increases and aggravates the risks for the local population, such

Expert Opinion, op. cit., par. 72: "(…) subjection of a group of persons to the jurisdiction of a foreign state in relation to their enjoyment of a wide range of rights guaranteed by international law (…) factual situation, that group may be perceived as a distinct racial group (…) occupant imposes measures or undertakes acts that violate the rights of the group as protected under international law, enumerated acts in the prohibition of apartheid will be committed (...) occupant's purpose in imposing the measures or undertaking the acts is to establish and maintain domination of one racial group-whether within the occupied territory or not-over the group subject to occupation, the wrong of apartheid will be committed (…)".

34See for example: Michael Lynk, Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, parr. 29-38, U.N. Doc. A/72/556 (23 October 2017). The ICJ Advisory Opinion, op. cit., parr. 103, 244: "(…) decided the question finding that the accumulated rights violations of Israel (settlement policy, annexation/acquisition of territory by force, discriminatory legislation and measures, denial of Palestinian self-determination) have turned the occupation as a whole unlawful (…)".

as the Palestinians.

Is there a specific justification for the crime of apartheid?

We cannot consider apartheid solely as a serious form of racial discrimination. The existence of a crime that includes discrimination as a criminal conduct also covers other crimes, such as genocide, persecution, and inhumane acts against humanity.

Apartheid presents itself as an international crime, an offense that goes beyond crimes, assuming systemic, structural forms, that destroy the freedom of an institutionalized regime (Lynk, 2018; Power, 2022; Jackson, 2022).[35] As an offense, it has a symbolic and expressive nature, that is, a crime that constitutes an overall and added value compared to other crimes provided for by the international statutes of international tribunals.

The Israeli-Palestinian discourse advances and focuses on a supposedly negative assumption about Palestinian identity under Israeli policy and the related post-colonial settlement project in the area, which also constitutes deep-seated causes addressed within the apartheid framework (Sayegh, 2012; Dugard & Reynolds, 2013; Erakat, 2021; Hussein, 2022).

35Truth & Reconciliation Commission, Truth and Reconciliation commission of South Africa report, (1998), https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf Accessed on 18.09.2025.

Post-colonial character foundations do not negate a project established in the post-1967 Israeli area by considering a definition of the crime of apartheid that accommodates the root causes of a respective social conflict. As a criminal offense that excessively seeks to nourish a workable understanding of the limited objectives of general criminal law. As a criminal legislative policy that rations itself to a system of crimes that has symbolic, expressive effects that aim to significantly deter human conduct and the related consequences of individual criminal responsibility.

A symbolic critique of apartheid is linked to the fact that it addresses the root causes of the conflict and produces no other significant deterrent effect because it is applied to judicial practice. Thus, the accusation of apartheid is used and the situation of the Palestinians is self-critically questioned. The material conditions and the occupation, in effect, have not changed in time.

The relationship between the ICC Statute and the Apartheid Convention

The connection between the ICERD, the Apartheid Convention, and the ICC Statute appears to analyze elements related to the crime of apartheid. In reality, the ICERD was replicated by the Apartheid Convention in the terms of the definition of racial

discrimination, that is, in Article 1, paragraph 1.

The ICC Statute independently precluded a definition of apartheid that falls within the framework of a customary rule and its related prohibitions (Jackson, 2022). Article 22, paragraph 3 of the ICC (Ambos, 2022) does not exclude from its negotiators what was pre-established by the Apartheid Convention, namely, the definition of the crime of apartheid in Article 7, paragraph 2, letter h). It is difficult to distinguish between Articles II of the Apartheid Convention and Art. 7, paragraph 2, letter h) of the ICC Statute (Ambos, 2022).

From a subjective point of view, the question arises whether the acts are relevant, committed in accordance with policies aimed at systematically oppressing the apartheid regime. Art. II contains some political elements that are based on Art. 7 of the ICC Statute, such as acts that have the intention of institutionalizing the same crime.

The relations between Palestine and Israel are downplayed. In any case, the terms of the element of intent as provided for in Art. II of the Apartheid Convention find their precise basis in objective circumstances, which thus also imply an element of a precise context that distinguishes the correct attribution of facts and alleged perpetrators.

Elements of the crime of apartheid based on the OPT

As we have already mentioned, Article 7, paragraph 2, letter h) of the ICC Statute is based on several important elements, such as inhuman acts, acts similar to those included in Article 7, paragraph 1 of the ICC Statute; a regime of oppression and systematic domination of a racial group or any other racial group; and the maintenance of a specific intention of this type of regime. The element of apartheid raises interpretative problems that are difficult to demonstrate in practice.

First of all, inhuman acts are explicitly referred to in Art. 7, par. 1, letters a) and i) StICC, such as murder, deportation, unlawful detention but also those acts that include serious injuries, suffering to physical integrity, acts related to torture that cause serious injury to physical integrity, mental health, physical, as well as similar inhuman acts (Jackson, 2022). This interpretation results in connection with par. 2, letter h) of Art. 7 StICC (Werle, Jessberger, 2020; Ambos, 2022)[36] and to acts of a similar character of the same serious nature which also include inhuman acts according to par. 1, par. k).

For reasons of legality, inhuman acts according to Art. 7, par. 1, letter k) StICC are limited. They include serious mental and

36Art. 7 (1)(k), StICC. Element 2 to Article 7(1)(j) of the Elements of Crimes, Report of the Assembly of States Parties to the Rome Statute of the I.C.C., U.N. Doc. ICC-ASP/1/3 (2002): "(…) act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts (…)".

physical harm according to the same definition found in national criminal law. These are acts that comply with apartheid acts pursuant to Article 7, paragraph 2, letter h) of the ICC Statute. This is a broad interpretation that has its own consequences. There is no level of severity that goes beyond the criterion resembling a restriction arising from the context of crimes against humanity.

Inhuman acts that fall within a general context for crimes against humanity, namely within an apartheid regime, are also included. The StICC includes the Apartheid Convention in Article II, paragraphs a) to f). This concerns specific acts that fall within Article II of the Apartheid Convention according to Article 7, paragraphs 1, letters a) to i) of the StICC.

These are acts that specifically refer to similar inhumane acts according to Article 7, paragraph 1, letter k) of the StICC. Paragraph 1 of the StICC is also included in a general manner. This is a category that is not part of the Apartheid Convention. The convention includes the rules of the ICC and similarly seeks to inform and interpret the inhumane acts of the StICC. This standard applies to the OPT case, which discusses various inhumane acts committed in the existence of this element, which is part not only of the crime of apartheid but also of any other crime under the StICC (Dugard, Reynolds, 2021).[37]

37Falk Report 2014, op. cit., 54; Lynk Report August 2022, op. cit., parr. 50, 55; Albanese Report 2022, op. cit., par. 6; Report of the Independent International

The existence of inhumane acts does not necessarily mean the crime of apartheid. However, restrictions, deportations of Palestinians, restrictions on free movement, etc., remain open to discussion.

Moving from an institutionalized oppressive regime to a systematic domination

Yet another element, alongside inhumane acts, is that of an institutionalized regime of oppression and systematic domination, as is the case in the OPT. This aspect requires the domination of a racial group, which faces serious interpretative challenges. It is an abstract, unique regime-based element that distinguishes the prosecution of crimes against humanity, according to Art. 7, paragraph 1, letter h) and paragraph 2, letter g) of the ICC (Ambos, 2022).

An institutionalized regime is a consequence of a system of oppression and discrimination that requires certain accompanying restrictive elements. A state structure is required to establish and maintain such a regime. Institutionalization means producing and demonstrating through specific legislation special institutions, as we have seen in the case of South Africa. There are no convincing restrictions in this case, and the state

Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, par. 42 (9 May 2022); Commission Inquiry Report September 2022, op. cit., 54, 77, 78. Art. II Application of Convention, op. cit., 17-20, 172, 272-274; Russell Tribunal, op. cit., par. 5.21; ICJ Advisory Opinion, op. cit., par. 11, 180.

structure does not necessarily imply organizational efficiency for the establishment and maintenance of this type of regime. It is a coincidence that the state, like all states with effective means, finds itself subjected to systematic oppression.

Depending on the circumstances, a non-state actor, a tightly organized insurrectionary movement that is part of a criminal organization, partially and territorially controls the establishment of a repressive regime. Precise and specific discriminatory legislation constitutes the normative basis of this type of regime, which falls outside the scope of legal requirements, as occurs in the application of the Convention on Policies and Practices Constituting Apartheid.[38]

This policy finds space in a normative basis without adequate and effective leadership instructions. Systematic repression and domination add a specific general context of a widespread, systematic nature, according to Art. 7, paragraph 1 of the ICC Statute. A specific element of apartheid is that understood in such a general context.

The systematic nature of this element simply confirms Art. 7, paragraph 1 of the ICC Statute, as a form of political organization and analysis. It is a systematic requirement that intends and adds the limits of oppression that refer to domination, given that it is a policy of apartheid. The existing

38Article 1(1) Add. Prot. II to the Geneva Conventions.

question of a substantial difference between domination and oppression is resolved affirmatively towards a formula that produces the same domination, which refers to the control of a population in a situation of apartheid.

The relative oppression also implies a continuous, prolonged, violent subjugation of the population. A continuous oppression maintains the regime in power. These concepts are autonomous elements of the crime of apartheid that is sanctioned by the ICC itself and is interpreted restrictively taking into account the practice we experienced in the South Africa.

The precise application of this policy and practice by Israel in the OPT leads to the conclusion that the relevant elements are satisfied for a lawful regime. The Palestinian people are discriminated against the legal system that privileges Israeli residents in the OPT area.[39]

A differentiated reasoning links the occupation with a certain group, namely the local population and the citizens of the occupier. This position concerns the principle of applicable law in the West Bank and international law of occupation (Gross,

39Commission on the Elimination of Racial Discrimination [CERD], Concluding observations on the combined seventeenth to nineteenth reports of Israel, CERD/C/ISR/CO/17-19, 15, 22 (27 January 2020): "(…) entirely separate legal systems and sets of institutions for Jewish communities in illegal settlements on the one hand and Palestinian populations (…) hermetic character of the separation (...)". ESCWA, op. cit., 4, 30, 37: "(…) four legal "domains" amounting to "one comprehensive regime" of racial domination). ESCWA, op. cit., par. 46 ("Jewish-national domination over an area dotted with Palestinian autonomy zones' similar to a "partition strategy (...) a unified state (…)").

2017).[40] The law of occupation is related to Art. 43 of the Regulation of the Hague (Kretzmer, Ronen, 2021) as a military law of the Israeli occupier in the form of military orders issued by the Israeli military commander. These are orders that seek to implement Israeli law and amend local law.

In other words, these are military orders that apply territorially to Palestinian residents and settlers based on their citizenship. It is a rule of conduct that constitutes a basis for Israeli state bodies in the OPT, respecting judicial review and using international law of occupation for the direct enforcement of human rights law. Israeli law is thus also applied to settlers as a direct enforcement of the settlements.

The Israeli Supreme Court has held that the law of belligerent occupation and Israeli law apply to the Basic Laws (Barak, 2023),[41] which provide individual rights to Israeli settlers, with consequences for the local Palestinian population as well.

The military commander's continued to adopt protective measures for Israeli settlers over the Palestinian population

40Gross affirmed that: "(…) official Israeli position (largely shared by the post-Barak Supreme Court case law) is that the occupation of the West Bank is unique in that it was not conquered from a rightful sovereign (Jordan, Egypt or any other power, "missing reversioner theory") and that therefore the Fourth Geneva Convention (GC IV) is not applicable (apart from lacking customary status) but that its humanitarian provisions would be applied nevertheless (…) contradictory approach regarding the 1907 Hague Regulations, accepted by Israel despite protecting the former sovereign of territory (…)".

41Silwad Municipality v. The Knesset, Judgement of 9 June 2020, is affirmed that: "(...)the State of Israel does not apply in the region" (quoted according to Adalah, Initial Analysis of the Israeli Supreme Court's Decision in the Settlements Regularization Law Case, 15 June 2020, 1).

supersedes the law of belligerent occupation.

The court's approach defines and confirms the dual legal regime that applies to international Palestinian law and the domestic law of Israeli settlers. Settlers do not benefit from the application of domestic Israeli law, but from the law of occupation according to Article 43 of the Regulation of the Hague of 1907. The Israeli Supreme Court considered the local population as a protected people who selectively apply this law, complementing the constitutional law on human rights to their advantage.

Israeli practice in the OPT is a paradigmatic example of application based on occupation law, which integrates the right to protect human rights, which is used by the local Palestinian population as well as the population that effectively protects the safety of settlers, thus limiting the rights that aggravate the structural imbalance between the two groups.[42]

The Israeli High Court of Justice, after the adoption in 2017 of the Law for the Regularization of Settlement in Judea and Samaria by the Knesset (Hostovsky brandes, 2020), ruled that all branches of government were subject to constitutional review, leaving open the issue of the Knesset's authority to enact extraterritorial legislation in its own jurisdiction.

The court recognized the transition from constitutional to international law with the aim of strengthening the protection of

42Law for the Regularization of Settlement in Judea and Samaria, 5777-2017, SH 2604 (Israel): https://www.legal-tools.org/doc/908988 Accessed on 18.09.2025.

persons under protection, namely Palestinians.

The court thus highlighted and confirmed that the legislative treatment is advantageous for its settlers but also legitimate, thus implicating the settlement project and its related policy as a whole. It is not surprising that the court is not a neutral actor but an organ of an occupying power that depends on the public trust of its own constituency. This planned regime for the OPT constitutes a clear, strong manifestation of systematic discrimination against settlers.

The new settlements limit Palestinian construction,[43] which excludes certain areas, as the regime creates a system of separation between settlers and Palestinians, thus labeling it a particular apartheid (Kretzmer, Ronen, 2021).[44] The lack of access to basic services for the Palestinian population is a characteristic of systematic discrimination against settlers. This demonstrates that continuously expanding settlements aggravate the territory.

43Commission Inquiry Report September 2022, op. cit., par. 45: "(…) planning and zoning regime applied by Israel reflects a clearly discriminatory approach (...) while a much more permissive regime is applied to planning and zoning in settlements (…)".

44Kretzmer and Ronen affirmed that: "(…) 1995 Oslo Interim Agreement, Israel retained full powers over land in Area C but this area comprises two thirds of the whole West Bank and the policy there affects Palestinians in "their" Areas A and B too (…) Palestinians have, *de facto*, been excluded from this area (...) "inherently discriminatory" planning process (…) carried out by the Israeli Civilian administration (…) "tailored to the needs of the Israeli settler population" turning it "into a privileged part of the local population, for whom special legal arrangements are made and for whose almost exclusive benefit land resources (…) are harnessed (…)".

A visible face of Palestinian discrimination is represented within the framework of an institutionalized regime of oppression and systematic domination for the OPT and in particular the West Bank. The Nation-State Law of 2018[45] was applied in the OPT as a fundamental law of Jewish identity and supremacy that makes evident the constitutional identity of the state of Israel (Kremnitzer, 2018).[46] It is not surprising that Jewish settlements have a national value that encourages its consolidation.[47]

45Report of the U.N. High Commissioner for Human Rights, The Allocation of Water Resources in the Occupied Palestinian Territory, including East Jerusalem, 5, 11, 17, U.N. Doc. A/HRC/48/43 (2021). See also The Nation State of the Jewish People, 5779–2018, SH No. 2743 (Israel).

46The Nation State of the Jewish People, 5779–2018, SH No. 2743 (Israel), § 1: "(…) "historical homeland of the Jewish people," "nation-state of the Jewish people" with right to self-determination "unique to Jewish people"). See HCJ 5866/18 Adalah v. Knesset, Petition for an Order Nisi, 3 (2018): "(…) a colonial law with characteristics of apartheid (…) a colonial regime with distinct apartheid characteristics"). Krmnitzer affirmed that: "(…) blunt discrimination to the constitutional level (…) apartheid regime (…) walking tall in Israel itself (…)". Commission on Economic, Social & Cultural Rights, Concluding Observations on the Fourth Periodic Report of Israel, 16-17, U.N. Doc. E/C.12/ISR/CO/4 (2019); CERD, par. 13-14; Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, 44, U.N. Doc. A/HRC/50/21 (2022); Human Rights Commissioner, Concluding Observations on the Fifth Periodic Report of Israel, 10, CCPR/C/ISR/CO/5 (2022). Commission on Economic, Social and Cultural Rights, Information Received from Israel on Follow-up to the Concluding Observations on its Fourth Periodic Report, 17, U.N. Doc. E/C.12/ISR/FCO/4 (2022): "(…) Law must be read together with other Basic Laws and referring to the HCJ Decision of July 2021 which stressed the general applicability of the principle of equality notwithstanding its omission in this law and state (…) fulfilled with flexibility and through balance with the right to equality, and not in a manner which could allow discrimination against individuals who are not Jewish and their rights to land (...)". See HCJ 5555/18 Hasson v. Knesset (2020) (Israel).

47HCJ 5555/18 Hasson v. Knesset (2020) (Israel), par. 7, Israel-The Nation-State of the Jewish People, 5778-2018 (Israel): "(…) development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and consolidation (…)".

Within this framework, this law is *de facto* affirmed towards the continued construction and expansion of unauthorized settlements.[48]

This creates a framework of guiding principles for the current government, which broadly expands Israel's right to the TOP through jurisprudence, direct and indirect legislation, and military orders that are part of the border between Israel and the OPT. Formal annexation does not mean worsening the situation for the local population.

Palestinian citizens of mainland Israel have host status in the identity documents granted to Palestinians in East Jerusalem and the West Bank. The West Bank does not reinforce the systematic discrimination that exacerbates the regime of oppression and domination that accompanies the local population. The related measures for the OPT are justified by various security concerns, including the closure of Palestinian roads[49] without, for the most part, being applied to them (Amnesty International, 2022).[50]

48Human Rights Commission, op. cit., par. 14: "(…) respective statements by different treaty bodies, the Security Council, the HRC and the GA) (…) increased settler violence (…) financial, legal and planning mechanisms (…) benefits and incentives (...) employed by Israel (…) half a century to enable the establishment and expansion of settlements and sustain them (…)".

49Route 443-West Bank road for Israelis only, B'tselem (1 January 2011), https://www.btselem.org/freedom_of_movement/road_443 Accessed on 18.09.2025.

50Amnesty International affirmed that: "(…) violations (…) no justification in security (…)". See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. par. 137: "(…) not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives (…) route cannot be justified by military exigencies or national security or

Security and political grounds for criticism were many and varied. The security situation sought to justify territorial expansion into Israel and the West Bank, thus deepening the closure of the OPT, especially in the West Bank, as well as the continued dispersion of the Palestinian people as a whole.

Defense and security do not justify the crime of apartheid, since it is practically prohibited by *jus cogens* and cannot be a legitimate means of achieving the goal of total security (Liakopoulos, 2020d).[51] It is systematic discrimination against an institutionalized regime that, according to apartheid, cannot justify normative considerations based on justice and the logic that distinguishes between permissible and inadmissible treatment and discrimination.[52]

Oppression of a specific racial group

The crime of apartheid requires continuous pressure with the ultimate goal of dominating one racial group over another.

public order (…)".

51ILC, Draft articles on responsibility of States for internationally wrongful acts, [2001] 2 Yearbook ILC, 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1, art. 26: "(…) "wrongfulness" of a violation of "a peremptory norm of general international law" can never be precluded (…)". ICJ Advisory Opinion, op. cit., 254: "(…) prohibition of acquisition of territory by force not be displaced by security concerns (…)".

52See also the judge Tanaka's dissenting opinion in South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, 1966 I.C.J. 6, 250, 306-10 (July 18) (dissenting opinion by Tanaka, J.): "(…) the concept of reasonableness (in terms of justice) as a justification of unequal (not arbitrary) treatment and indeed sees it regarding apartheid "in some matters" (...) discrimination as a consequence of apartheid as always "illegal whether (…) *bona fide* or *mala fide*," id. at 309, and the respective measures as mostly unreasonable (…)".

Israeli discriminatory policies and practices in the OPT are qualified as racial discrimination according to Article 1 of the ICERD, including discrimination based on national and ethnic origin.

The Committee on the Elimination of Racial Discrimination (CERD) has characterized practices of racial segregation and apartheid as a violation of Article 3 of the ICERD,[53] which includes discrimination based on national and ethnic origin, thus characterizing practices related to racial segregation and apartheid that are not confused with the racial group.

Palestinian discrimination in the OPT is not confused with the racial group for groups and peoples according to the definition of the crime based on Article 7, paragraph 2, letter h) of the ICC Statute, despite the fact that it does not include the notion of discrimination (Lingaas, 2021).

The definition of the notions of racial group and race determines whether racial discrimination under Art. 1, letter 1, ICERD, is based on the OPT, which is equivalent to the Israeli, Jewish, and/or Palestinian racial groups under Art. 7, paragraph 2, letter

53CERD, Consideration of Reports. Submitted by State Parties Under Article 9 of the Convention: Concluding Observations, par. 24, U.N. Doc. CERD/C/ISR/CO/14-16 (9 Mar. 2012): "(…) state party's attention to its 1995 General Recommendation 19 concerning the prevention, prohibition and eradication of all policies and practices of racial segregation and apartheid (…) disproportionately affect the Palestinian population in the Occupied Palestinian Territory, and which violate the provisions of Article 3 of the Convention) (…)".See also Art. 3 ICERD); Human Rights Commission, Concluding Observations on the Fourth Periodic Report of Israel, par. 7, U.N. Doc. CCPR/C/ISR/CO/4 (21 Nov. 2014): "(…) Jewish and non-Jewish population are treated differently in several regards (…)".

h), ICC (Ambos, 2022). The principle of legality is rigorously established. The concept of racial group is broadened, interpreted as racial discrimination, and racism[54] is replaced and invoked by a broad interpretation of human rights (Lingaas, 2015b).

The relevant case law does not uniformly include the subjective approach[55] and in other hypothetical situations[56] seeks a combined approach that is precise in its context (Lingaas, 2021). The subjective approach is not so convincing, it appears uncertain (Lingaas, 2015; Lingaas, 2021) and for this reason it seeks a dual subjective and objective approach as a self-perception of the offender that requires a combination of both.

In this way, race is examined and interpreted in such a way as to include the perception of a dual subjective and objective approach that allows for the self-perception of perceived racial and ethnic differences. The subjective approach encompasses a socio-anthropological form of race from which diversity, or rather, alterity, prevails.

54Israel Penal Code art. 144A: "(…) persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against a public or parts of the population, all because of their color, racial affiliation or national ethnic origin (…)".

55Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, par. 514 (2 September 1998): "(…) an (questionable) objective approach relying on a "conventional definition of racial group (…) based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors (…)".

56Prosecutor v. Rutaganda, Case No. ICTR- 96-3-T, Judgment, Trial Chamber I, parr. 56-58, (6 December 1999): "(…) subjective definition alone is not enough, but instead one that is context-specific and case by case (…)".

It is perceived and treated as a distinct racial group qualified under the crime of apartheid (Barskanmaz & Nahed Samour, 2020). The legal definition of race as a distinct perception includes the OPT groups that are actual and characterized as racial groups.

Within this framework, such an approach is connected to a subjective basis of sociological and less legal understanding linking race to perceptions and behaviors that are built on a biological foundation (Goodman, 2020). In this sense, the definition of race is based on a construction of social attribution that determines the perceptions of a dominant group that integrates certain specific objective factors into a logical, scientific context.

The lack of a statement justifying discrimination in terms of racial superiority demonstrates that Israel considers Palestinians to be a distinct racial group, a perception of attribution of objective policies and practices of the OPT (Dugard, Reynolds, 2013).[57]

57Dugard, Reynolds affirmed that: "(…) formation and evolution of Jewish and Palestinian identities are remarkably complex arguing that for the purpose of the definition of apartheid under international law (…) constructed as groups distinguished by ancestry or descent as well as ethnicity, nationality, and religion (…) distinguished from each other in a number of forms within the parameters of racial discrimination under international human rights law (…) a group based on descent and/or ethnic or national origin, Palestinians as a group defined primarily by national origin (...) Jews and Palestinians (…) constructed and perceived both by themselves and by external actors as stable and permanent groups distinct from each other, and therefore can be considered as different racial groups for the purposes of the definition of apartheid (…) Jewish Israelis and Palestinian Arabs may be understood as distinct racial groups distinguished by their nationality, ethnicity, religion, ancestry and

There are no arguments or conclusions that include this position, given that they consider Palestinian Arabs and Israeli Jews as distinct racial groups, and that the concept of racial discrimination under Article 1 of the ICERD also includes the identity of groups based on ethnic and national descent. It is difficult to define the scope of the crime in connection with the principle of legality.[58] This is an equation of racism and Zionism, considering Zionist colonization as a racial expression (Sayegh, 2012),[59] whereas Israel, as a racial state, is based on Jewish and racial supremacy.

Racial grouping is used in the Israeli-Palestinian conflict only if it is perceived in racial terms without legally achieving the OPT's discrimination, which is not based on race but on nationality as a type of differential treatment between Israeli and Palestinian citizens. Racial discrimination is excluded according to Article 1, paragraph 1 of the ICERD and according to letter b) concerning racial group domination.

descent; policies/law define who is a Jew and who is not a Jew (the non-Jewish population being overwhelmingly Palestinian (…)".

58G.A. Resolution 3379 (XXX), 10 November 1975: "(…) unholy alliance between South African racism and Zionism (…)". in G.A. Resolution 3131, 14 December 1973, affirmed that: "(...) Zionism is a form of racism and racial discrimination (…)". G.A. Resolution 46/86, 16 December 1991.

59Sayegh affirmed that: "(...) racial self-segregation demands 'racial purity and racial exclusiveness' requiring the eviction of all non-Jews (…) Palestine (…) race-supremacism expressed (…) passionate (...) thoroughgoing racial exclusiveness and for the physical expulsion of 'native' populations (…) racial elimination as 'motto of the race-supremacist European settler-regime in Palestine (...)".

The existence of discrimination based on Article 1, paragraph 1 of the ICERD distinguishes between citizens and non-citizens, and according to Article 1, paragraph 2 of the ICERD, between citizens of an occupying population and the local population (Koplow, 2022), which is protected under the law of occupation. Regardless of the distinction based on national origin and nationality, Articles 1, paragraph 2 and 1, paragraph 3 of the ICERD provide a legal attribution and scope of discretionary power for the state, excluding the possibility of discrimination based on other racial grounds.[60] Also excluded positions concerning that racial groups are linked to the crime of apartheid through discriminatory reasons, as well as interdependence with varying degrees in time and in a specific geographic area.

The distinction based on nationality does not mean that the difference in treatment cannot have a regime of oppression and predominance of one racial group over another (Jackson,

60Application of International Convention on Elimination of all Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, 2019 I.C.J. par. 74, 81 (29 April), par. 105: "(...) "national origin" does not encompass "current nationality"). Contra the broader view of the CERD according to which "differential treatment based on citizenship (…) will constitute discrimination if the criteria for such differentiation (…) applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim (…)". CERD, General Recommendation No. 30, adopted on 1 October, 2002, no. 4; CERD, Admissibility of the inter-state communication submitted by Qatar against the United Arab Emirates, 30 August, 2019, CERD/C/99/4, parr. 53, 59-60, 63.

2022).[61]

Racial discrimination entails the predominance of one racial group according to the crime of apartheid, which depends on specific circumstances that judges find necessary for racial predominance.

Individual responsibility and general, special intention

Dolus specialis requires a general mental element according to Art. 30 of the ICC Convention. Generally, a person, as a potential perpetrator, acts with intent, i.e. he has knowledge of the material elements of the respective crime according to Art. 30, paragraph 1 of the ICC Convention (Liakopoulos, 2019a; Liakopoulos, 2019b), a mental element that extends to the context of the *actus reus*.[62]

For apartheid, the elements of crimes according to Art. 7, paragraph 1, letter j) of the ICC Convention (Ambos, 2022) are integrated into Art. 30, which concerns the element of a general context for crimes against humanity, and Art. 7, which provides that the perpetrator engages a conduct that is part of a

61Jackson affirmed that: "(...) basis of nationality may, in certain circumstances, coincide with an operative racial classification in a particular context (…) nationality may track a conception of race in a certain place and time (…) imposed in such cases may entail both discrimination on the basis of nationality and discrimination on the basis of race (…) apartheid (…)".

62Elements of Crimes, op. cit., General Introduction, no. 2, cl. 1: "(…) reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element (...) intent, knowledge or both, set out in article 30 applies (…)".

widespread, systematic attack against a civilian population. And he or she is aware of the acts that are part of an institutionalized regime, which constitutes a specific element of the crime of apartheid. Element no. 3 also requires the perpetrator to be aware of his or her own factual circumstances, which establish the nature of the act and its gravity as an inhumane act. Element no. 5 exists for the respective perpetrator to possess it as such.

The crime of apartheid has no way of limiting a group of perpetrators and leaders. Such a limitation explicitly provides for the crime of aggression according to the proposal of the ILC.[63] The crime of apartheid according to Art. 7, par. 2, letter h) StICC refers to the individual responsibility of an intentional perpetrator.

The crime of Art. II of the Apartheid Convention establishes the prohibition of the crime, thus explaining how states and their own intention overcome the objective violation of the prohibition (Liakopoulos, 2020b; Clancy, 2023).[64] This is a serious violation of an international obligation that includes state responsibility[65] which addresses individual perpetrators. The commission of *actus reus* for individual criminal responsibility avoids the mental confusion of the crime.

63Art. 20(1) ILC Draft Code 1991 limited the crime to a "leader or organizer".

64ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, annex G.A. Res. 56/83, arts. 2(b), 12-15 (12 December 2001), op. cit., par. 41, 48, 51, 54.

65See also: Art. 2(a) ILC Draft articles (Commentary on Article 2, [2001] 2 Yearbook of ILC, 34, par. 3, U.N. Doc. A/56/10.

The meaning of evidence

Intention specifies the ways in which genocide (Jackson, 2022) is proven (Williams & Baker, 2024) as a volitional element of an intensive form. In this intention, the *actus reus* is equivalent to an extended mental element representing the perpetrator. Thus, the crime of apartheid is applied, acting as a specific intentional goal that maintains the respective regime despite the objectives pursued.

Inhumane acts are objective and committed by the perpetrator, who effectively contributes to the maintenance of a regime that subjectively does not pursue this objective, that is, apartheid. In a precise sense, inhumane acts are linked to outcomes that maintain the respective regime. This outcome is not part of the *actus reus* (Liakopoulos, 2019b; Puppe, 2022).

Specific intent is difficult to prove, and the unintended consequence is not the goal itself, given that the drafters intended to establish a position regarding the exclusion of groups that create criminal liability.

The expansive interpretation for the accused replaces the requirement of specific intent with a collective one through the cognitive reformulation regarding the perpetrators of genocidal acts. A broadening of the concept of apartheid does not appear to include intent, and the distinction between genocidal acts

does not allow for a broad position of pre-established articles with the aim of proving genocide.

The approach based on the subject of genocide has not been ignored by jurisprudential practice (Greenawalt, 1999). Apartheid as a crime interprets the general principles of criminal law restrictively in favor of the accused. Thus, the prosecution is left to demonstrate a specific intention to commit apartheid.

Intentionality is difficult at a level that pertains to the political level and that designed the respective apartheid regime. Criminal proceedings for crimes with a specific intent include apartheid targeting individuals at a senior level, not just low-level perpetrators. Political affiliation does not impact the statutory structure of the crime or the specific intent requirement (Renno, 2021; Roberts, 2022; Ambos, 2024).

Some doubts

Doubts arise due to the lack of direct evidence and the defendant's incriminating statement. General, special intent is consistent with *dolus ex re* as circumstantial evidence, that is, circumstances, facts, and events that inform the *factum probandum*,[66] the context of the precise intention of apartheid.

66Merabishvili v. Georgia, App. No. 72508/13, par. 317 (28 November 2017): "(…) primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts (…)". General Introduction, no. 3 (Existence of intent and knowledge can be inferred from relevant facts and circumstances) (...)".

A trial outcome that leads to precise conclusions is equivalent to evidence evaluating possible conclusions (Anderson, 2005). It is assumed that circumstantial evidence is relevant and established beyond reasonable doubt.

The intent for specific genocidal acts of destruction and the intention of a series of facts and circumstances within a general context and the perpetration of other culpable acts systematically directed against the group and the scope of atrocities are committed to a systematic targeting of victims due to membership in a group that repeatedly commits destructive acts of a discriminatory nature.[67]

Within an inhumane context that stigmatizes the targeted group, the perpetrators are accompanied by the implication of the existence of a required intention.[68] In the case of apartheid, the precise intention deduces a framework of inhumane acts and a precise contextual element such as an institutionalized regime of oppression and systematic domination.

The regime includes widespread inhumane acts. The knowledge that involves the maintenance of this regime is plausible. Now we also speak of group responsibility that accepts the jurisdictions, the objectives of the group structure and the

67Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgement, par. 47 (ICTY, 5 July 2001).

68Human Rights Commission, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, par. 1419, U.N. Doc. A/HRC/39/CRP.2 (17 September 2018).

indications, the conduct of the intention of an individual nature.[69]

The accused is involved in a system that denies knowledge of a regime present in inhumane acts that imply and voluntarily consider, the presumption of knowledge to a lower level of knowledge as sufficient, as a sort of perceived and willed ignorance (Sarch, 2019).[70] Knowledge is the basis of a conduct that has the objective of being part of a general apartheid regime that contributes to the maintenance of a result from the point of view of state responsibility.

A tacit acceptance, approval of a harmful, criminal result contributes to the maintenance of an apartheid regime in a precise, clear, volitional way that pushes towards an original cognition of an objective that is equivalent to a *dolus specialis* of apartheid.

By developing this aspect and delving deeper into the concept of intent, we oriented toward a general discussion of individual responsibility, which in reality does not concern but presumes a conduct based on a knowledge objective.

69Claiborne Hardware, 458 U.S. at 920 (albeit a tort case): "(…) liability to be imposed by reason of association alone, it is necessary to establish (...) a specific intent to further those illegal aims (…)".

70Sarch affirmed that: "(...) if the defendant was merely willfully ignorant of the relevant proposition (...) carry contains drugs to turning a blind eye to the possibility that one's employees is engaged in money laundering. This doctrine allows courts to treat such defendants as if they had the knowledge required for conviction (...)".

The fundamental structural tendency of the crime of apartheid contrasts with the intention of a necessary result, which interprets ignorance based on circumstances that allow precise and specific results to an evidentiary problem applicable to a courtroom.

In the Karadžić case, the ICTY chamber of the first instance[71] highlighted the defendant's genocidal intent for the Srebrenica area, relying on the logic of an unequivocal conclusion that is part of a single reasonable basis of a standard that goes beyond a reasonable doubt.[72]

Illusory inferences qualify a deductive process that restricts the standard of reasonable doubt, based on compliance with the ordinary standard of all reasonable doubt, since this standard is

71Prosecutor v. Karadžić, Case No. IT-95-5/18-T, Trial Judgement, par. 5814 (Int'l Crim. Trib for the Former Yugoslavia March 24, 2016) ("beyond reasonable doubt"); par. 5830 ("only reasonable inference available").

72Kosovo Specialist Chambers (KSC) Rules of Procedure & Evidence (RPE) 140 (3): "(…) beyond reasonable doubt standard regarding circumstantial evidence "is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented (...)". Prosecutor v. Gucati, KSC-BC-2020-07, Trial Judgment, par. 37 (18 May 2022); Prosecutor v. Mustafa, KSC-BC-2020- 05, Trial Judgment, par. 29 (6 December 2022). Prosecutor v. Bemba, ICC-01/05-01/13-2275-Red, Judgment on Appeal, par. 868 (8 March 2018). Prosecutor v. Bemba, ICC-01/05-01/08-3343, Trial Judgment, par. 192 (21 March 2016). Prosecutor v. Bemba, ICC-01/05-01/08-3636-Anx1-Red, Concurring Dissenting Opinions of Judges Mmasenono and Hofmanski in Judgment on Appeal, parr. 268-269 (8 June 2016); Prosecutor v. Merhi, STL-11-01/A-2/AC, Judgment on Appeal, parr. 48, 55, 95 (10 March 2022). Prosecutor v. Ntaganda, ICC-01/04-02/06-2666-Red, Judgment on Appeal, par. 939 (30 March 2021): "(…) only reasonable inference test by arguing that concluding co-perpetration from certain findings by inference was "reasonable" since Defense did "not set out any alternative conclusion" (...)". HRC Myanmar Report, op. cit., 1434-1438. ICJ Advisory Opinion, op. cit., Separate Opinion Judge Nolte, parr. 12-13. Prosecutor v. Zigiranyirazo, Case No. ICTR 01-73-A, Judgment on Appeal, par. 49 (16 November 2009).

sufficient for the judge to be convinced of the precise intent that derives from a totality of evidence, including, with relevance, the reasonableness of a recent practice, thus confirming the reasoning deduced with intent for the crime of apartheid.

The high standard that complies with the ordinary one goes beyond all reasonable doubt, since the lack of direct evidence allows for an external conduct that appears to be the only reasonable inference, a quality of circumstantial evidence in relation to the holistic evaluation that makes this test flexible.[73] A standard of judicial discretion with possible reasonable inferences is the only reasonable course of action for the crime of apartheid.

Is there a specific apartheid intent for the OPT?

The existence of a specific apartheid intent related to Israel's policy in the OPT is generally linked to Israel's collective intent (Dugard, Reynolds, 2013),[74] which requires a single author to

73Prosecutor v. Lubanga, ICC-01/04-01/06-3121, Judgment on Appeal, par. 22 (1 December 2014).

74Dugard, Reynolds affirmed that: "(…) can be drawn from the institutionalized and systematic regime of inhumane acts and discrimination (...) Israel intends to secure the domination (…) Israel's occupation evidence of an intention to maintain the domination of Jews over Palestinians (...)". See also: Lynk Report August 2022, op. cit., par. 54: "(…) alien rule has been established with the intent to maintain the domination of one racial-national-ethnic group over another (…) Israel's "body of laws" as evidence of purpose to maintain regime (…) regime developed for the purpose of ensuring (…) domination (…). Israel's policy and conduct, especially settlement project, amounting to a creeping annexation: "evidence (…) of Israel's intent powerful to the point of being unequivocal, manifest and conclusive (…) manifest, deliberate policy of dispossession, settlement and creeping annexation gives away its intent to cement its control and perpetuate the suspension of

precisely assess the scale of circumstances and available evidence. This analysis exceeds the natural limits of abstract positions and addresses more legal and less political issues of a subjective nature, related to apartheid, thus furthering the evolution of the relationship between the crime of apartheid and the OPT.

The knowledge-based approach addresses the precise intention of apartheid, distinguishing low-level perpetrators from medium- and high-level one based on available evidence. Israeli political leaders' statements enable the apartheid system (Hasan, 2017), expressing the will to maintain the current one, which

sovereignty and Palestinians' rights (…) can be inferred from the prolonged nature of the cruel and discriminatory treatment, which indicates the non-accidental nature of the oppression and domination perpetrated against Palestinians (…) Israeli actions and policies manifests an intent to establish and maintain Jewish Israeli domination and suppression of Palestinians Israel's actions are done with an intent to establish and maintain Jewish Israeli dominance over Palestinians (...)". ICJ Advisory Proceedings, op. cit.. See also the Statement by Namira Negm on behalf of the State of Palestine, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/4, (19 February 2024), at 80, 82 n. 100; Statement by Stemmet on behalf of the State of South Africa, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/5, at 18-19 (20 February 2024); Statement by Webb on behalf of the State of Belize, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion),CR 2024/6, at 15-16 (20 February 2024): "(…) "scale and institutionalized nature" and "differing effects," but mixing up genocidal and apartheid intention and ignoring the standard of proof) (...)". Statement by Dausab on behalf of the State of Namibia, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/11, at 11-12 (23 February 2024): "(…) South African apartheid in Namibia and Palestine); Statement by Wilde on behalf of the League of Arab States, Verbatim Record, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion), CR 2024/13, at 26, 28 (26 February 2024), par. 226-229.

thus favors the expansion of Palestinian settlements (Khalid, 2023).[75]

These are declarations that are common and explicit in the current Israeli government, accompanied by historical and religious disputes that deny Palestinian self-determination of the state of Palestine (Magid, 2024).[76]

These are declarations of a political nature that are expressed in current coalition agreements that cannot explain the intention of apartheid. They are considered as indications that show their intention (Raday, 2022).[77]

The Nation-State Law of 2018 was applied in the OPT indirectly

75Lynk Report August 2022, op. cit., par. 46: "(…) Prime Minister Netanyahu stating in 2019 that "[a] Palestinian state will endanger our existence (…) divide Jerusalem, I will not evacuate any community [settlement] and I will make sure we control the territory west of Jordan (...)". Par. 54: "(…) Israeli political leaders, past and present, have repeatedly stated that they intend to retain control over all of the occupied territory in order to enlarge the blocs of land for present and future Jewish settlement while confining the Palestinians to barricaded population reserves (…) Israel is not a state of all its citizens" but rather "the nation-state of the Jewish people and only them". (...) More recently he rebuked the UNSC's rejection of settlements arguing that it "denies the rights of Jews to live in our historic homeland (...)".

76Letter from Yossi Fuchs, Cabinet Secretary, Israel Office of the Prime Minister, to Adalah Legal Center for Arab Minority Rights in Israel (19 June 2023), https://www.adalah.org/uploads/uploads/Response_Cabinet_Secretary_19_June_2023.pdf Accessed on 18.09.2025: "(...) "settlements in Judea and Samaria" over which "Israel has a right to impose its sovereignty (…) cradle of the history of the Jewish people (…) an even more radical view (…) right wing, Zionist, faith-based approach (…) there is no room in the Land of Israel for two conflicting national movements (…) exclusive belonging to the Land of Israel" and invoking an orthodox belief in the (…) our unfolding redemption", the "destiny and mission of the Jewish People for the whole world" and calling for a "victory by settlement", denying, however, that this amounts to apartheid (…)". The Knesset's rejection of Palestinian statehood on 18 July 2024, one day before the issuing of the ICJ's Advisory Opinion.

77Raday affirmed that: "(...) statements by successive Israeli political leaders of various political parties, who have emphasized the overarching objective of maintaining Israel's identity as a Jewish state and the fact that this is perceived to require preventing Palestinians from full enjoyment of equal rights (…)".

but can be read as a legislative intention that concerns the constitutionalization of a discrimination of the apartheid regime (Ohlin, 2007). None of these statements are surprising and explicitly refer to apartheid, which comes close to admitting that the crime of apartheid in legal terms does not exist. An official position thus summarizes the rejection of such statements as extreme and exaggerated (Carey, 2022).[78] Declarations that are made available by authors of medium, low level of public officials as well as simple soldiers who through similar opinions demonstrate that the recordings are heard evidence.

Sufficient declarations, along with various circumstances, specify the intention of apartheid with alleged security motivations given the distinction between intention and primary motive. The uncertainty of a relationship between intention and knowledge seems relevant.

The related involvement of Israeli policies and practices in the occupied territories at an administrative and operational level possess a constitutionalized regime of oppression with systematic domination. A regime that has existed for years, policies that are documented by international bodies.

78HCJ 2150/07 Abu Safiyeh v. Minister of Defense, Judgment, PD par. 6 (2009) (Israel) (concurring opinion by President Beinisch: "(…) security measures taken by the State of Israel in defending against terrorism and the unacceptable practices of the Apartheid policy oblige refraining from any comparison or use of the dire phrase (…) instance of wrongful discrimination constitutes Apartheid (…) comparing the prevention of movement (…) crime of Apartheid is so extreme and exaggerated that there was no room to raise it at all (…)".

The knowledge that entails voluntary approval of the harmful consequences is equivalent to the intentional conduct based on the objective. An objective that in principle depends on every public official of a state who bears criminal responsibility (Ronen, 2017), thus clarifying the proof of the precise intention of apartheid, which in a challenging way depends on the precise circumstances in each case. A precision that goes beyond the confines of politics and the actual situation in the OPT area.

Conclusions

Article 7, par. 7, par. 2, letter h) of the ICC Statute has shown and highlighted that the inhumane acts referred to in this article are directly affirmed. An element of the existence of an institutionalized regime of oppression is the systematic domination by one racial group over any other, with the intention of maintaining a regime riddled with normative, factual, and evidentiary problems that make it impossible to reach plausible assertions and conclusions that support the relationship between the OPT and the crime of apartheid as a driving force behind a legal and political project that maintains that the OPT, through an institutionalized apartheid regime, belongs to a post-1967 settlement of the apartheid situation in South Africa.

This is an acceptance of a project with collateral effects in terms

of public order and security. A project that argues with less certainty that the OPT is part of a racial domination by Israeli citizens, as settlers of a local Palestinian population that respects the perpetrators with a specific intention of apartheid and maintaining its regime.

The considerations are high in the specific intention, which shows the limits of the often abstract considerations of specific accusations. Each case, depending on the circumstances, is specific to an accusation of apartheid against a specific defendant, standing up to an independent and not necessarily international tribunal.

References

Addameer, International Human Rights Clinic Harvard Law School (IHRC) (2022). *Apartheid in the Occupied West Bank: A legal analysis of Israel's actions.* 19-22: https://hrp.law.harvard.edu/wp-content/uploads/2022/03/IHRC-Addameer-Submission-to-HRC-COI-Apartheid-in-WB.pdf Accessed on 18.09.2025.

Aizenberg, S. (2022). A Threshold crossed: Documenting HRW's "apartheid" fabbrications. *NGO Monitor.*

Aizenberg, S. (2022). Amnesty international's cruel assault o Israel: Systematic lies, errors, omissions and double standards. *NGO Monitor*: https://www.ngo-monitor.org/pdf/SaloAizenberg_Amnesty_Rebuttal.pdf Accessed on 18.09.2025.

Ambos, K. (2 March 2021). "Solid jurisdictional basis"? The ICC's Fragile Jurisdiction for Crimes Allegedly Committed in Palestine. *EJIL:TALK!:* https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine Accessed on 18.09.2025.

Ambos, K. (2022). *Rome statute of the International Criminal Court.* Hart/Beck/Nomos, Cheltenham, Baden-Baden.

Ambos, K. (2024). Treatise on international criminal law: International criminal procedure. Oxford University Press,

Oxford, 510ss.

Amnesty International (2022). Israel's Apartheid against palestinians. *Amnesty International*, 268ss

Anderson, T., Schum, D., Twining, W. (2005). *Analysis of evidence*. Cambridge University Press, Cambridge, 98ss.

Asseburg, M. (2023). Amnesty International's Apartheid Report. *Palestine-Israel Jounal, 23*, 1, 4ss.

B'tselem, Navot, K. (2021). *This is ours-and this too. Israel's settlement policy in the West Bank*. 4ss: https://www.btselem.org/publications/202103_this_is_ours_and_this_too Accessed on 18.09.2025.

B'tselem. (2022). *This is apartheid. The Israeli Information Center for Human Rights in the occupiued Territories:* https://www.btselem.org/publications/202210_not_a_vibrant_democracy_this_is_apartheid Accessed on 18.09.2025.

Baldwin, C., Max, E. (9 July 2021). Human Rights Watch Responds: Reflections on Apartheid and Persecution International Law. *EJIL:TALK!:* https://www.ejiltalk.org/human-rights-watch-responds-reflections-on-apartheid-and-persecution-in-international-law Accessed on 18.09.2025.

Barskanmaz, C., Samour, N. (16 June 2020). Diskriminierungsverbot aufgrund der Rasse. *Verfassungblog:* https://verfassungsblog.de/das-diskriminierungsverbot-

aufgrund-der-rasse Accessed on 18.09.2025.

Brandes, H. (2022). Israel's Legal System. In G. Ben-Porat and others, *Routledge handbook on contemporary Israel.* Routledge, London, New York. 114, 125ss.

Bultz, A. (2013). Redefining Apartheid in International Criminal Law. *Criminal Law Forum, 24,* 205-206.

Carey, A. (2 February 2022). Amnesty accuses Israel of apartheid over treatment of Palestinians, prompting angry response. *CNN:* https://edition.cnn.com/2022/02/01/middleeast/israel-apartheid-amnesty-intl/index.html Accessed on 18.09.2025.

Cassese, A., and others. (2013). *Cassese's international criminal law.* Oxford University Press, Oxford, 108ss.

Cherif Bassiouni, M., Derby, D.H. (1981). Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments. *Hofstra Law Review, 9*, 523, 534ss.

Clancy, P. (2023). Neutral Arms Transfer and The Russian Invasion of Ukraine. *International & Compaerative Law Quarterly, 72,* 527, 538ss.

Cohen, A., Shany, Y. (13 November 2023). Israel's War Cabinet: A Brief History of War Powers and Institutional Ambiguity. *Lawfare:*

https://www.lawfaremedia.org/article/israel's-war-cabinet-a-brief-history-of-war-powers-and-institutional-ambiguity Accessed on 18.09.2025.

Dinstein, Y. (2019). *The international law of belligerent occupation.* Cambridge University Press, Cambridge, 39ss.

Dugard, J. (2012). L'Apartheid. In H. Acensio, E. Decaus, A. Pellet, *Droit international pènal.* ed. Pedone, Paris.

Dugard, J., Reynolds, J. (2 October 2013). Apartheid in Occupied Palestine: A Rejoinder to Yaffa Zilbershats. *EJIL:Talk!:* https://www.ejiltalk.org/apartheid-in-occupied-palestine-a-rejoinder-to-yaffa-zilbershats Accessed on 18.09.2025.

Dugard, J., Reynolds, J. (2013). Apartheid, International Law, and the Occupied Palestinian Territory. *European Journal of International Law, 24*, 867, 8689ss.

Eden, P. (2014). The Role of the Rome Statute in the Criminalization of Apartheid. *Journal of International Criminal Justice, 12, 17*1, 192ss.

Erakat, N. (5 July 2021). Beyond Discrimination: Apartheid is a Colonial Project and Zionism is a form of Racism, *EJIL:Talk!:* https://www.ejiltalk.org/beyond-discrimination-apartheid-is-a-colonial-project-and-zionism-is-a-form-of-racism Accessed on 18.09.2025.

Gebhard, J. (2018). Apartheid. *Max Planck Encyclopedia of Public Internatiomnal Law*, par. 28.

Gless, G. (2021). *Internationales Strafrecht. Grundiss für Studium und Praxis*. Helbing Lichtenhahn Verlag, Basel.

Goldberg, A. (23 August 2023). Apartheid ist Realität in Israel. *Frankfurter Allgemeine Zeitung:* https://www.faz.net/aktuell/feuilleton/debatten/nahost-konflikt-apartheid-ist-unsere-realitaet-in-israel-19120442.html Accessed on 18.09.2025.

Goodman, A. (2020). Race is Real, but It's Not Genetic. *Sapiens:* https://www.sapiens.org/biology/is-race-real Accessed on 18.09.2025.

Greenawalt, A. (1999). Rethinking Genocidal Intent. *Columbia Law Review, 99,* 2259, 2281ss.

Gross, A. (2017). *The writing on the wall.* Cambridge University Press, Cambridge, 250-252.

Grote, R. (2022). From the Law of Belligerent Occupation to International Human Rights Law: In Search of a New Legal Paradigm for the OPT. In N. Hasan, I. Schneider, *International law between translation and pluralism.* ed. Brill, Bruxelles, 292-294.

Gurvitz, Y. (29 April 2014). *What is NGO Monitor's connection to the Israeli government:*

https://www.972mag.com/what-is-ngo-monitors-connection-to-the-israeli-government Accessed on 18.09.2025.

Hasan, M. (22 May 2017). Top Israelis have warned of apartheid, so why the outrage at a UN Report?. *The Intercept:* https://theintercept.com/2017/03/22/top-israelis-have-warned-of-apartheid-so-why-the-outrage-at-a-un-report Accessed on 18.09.2025.

Hostovsky Brandes, T. (14 June 2020). Constitutional Adjudication of International Law Violations. *Verfassungsblog:* https://verfassungsblog.de/constitutional-adjudication-of-international-law-violations Accessed on 18.09.2025.

Hostovsky Brandes, T. (2020). The Diminishing Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories. *International Journal of Constitutional Law, 18*, 767, at 768, 770.

Hostovsky Brandes, T. (3 January 2023). Annexation is in the Details. *Verfassungsblog*: https://verfassungsblog.de/annexation-is-in-the-details Accessed on 18.09.2025.

Hostovsky Brandes, T. (2023). The Constitutional Overhaul and the West Bank: Is Israel's Constitutional Moment Occupied?. *Israel Law Review, 56,* 415, 422ss.

Human Rights Watch (HRW). (2021). A Threshold crossed. *Human Rights Watch. 80,* 171ss.

Hussein, R. (2022). Which Israel are we Facing? A Different View of Israel. *Palestine-Israel Journal of Politis. Economy & Culture, 27*, 1, 2.

Jackson, M. (2022). The Definition of Apartheid in Customary International Law and the International Convention on the Elimination of All Forms of Racial Discrimination. *International & Comparative Law Quarterly, 71*, 831, 834-852.

Kattan, V., Johnson, D. (21 September 2023). The Crime of Apartheid beyond Southern Africa: A Call to Revive the Apartheid Convention's "Group of Three". *EJIL: TALK!:* https://www.ejiltalk.org/the-crime-of-apartheid-beyond-southern-africa-a-call-to-revive-the-apartheid-conventions-group-of-three Accessed on 18.09.2025.

Keane, D. (5 September 2024). A Missed Opportunity: The Decision in Palestine v. Israel. *EJIL: TALK!:* https://www.ejiltalk.org/a-missed-opportunity-the-decision-in-palestine-v-israel Accessed on 18.09.2025.

Kemp, G., Nortje, W. (2023). Prosecuting the Crime Against Humanity of Apartheid. The Historic First Indictment in South Africa and the Application of Customary International Law. *Journal of International Criminal Justice, 21,* 407ss.

Kern, J. (7 July 2021). Uncomfortable truths: how HRW errs in its definition of "Israeli apartheid", what is missing, and what are th implications?. *EJIL: TALK!:*

https://www.ejiltalk.org/uncomfortable-truths-how-hrw-errs-in-its-definition-of-israeli-apartheid-what-is-missing-and-what-are-the-implications Accessed on 18.09.2025.

Kern, J., Herzberg, A. (2021). False knowledge as power: Deconstructing definitions of apartheid that delegitimise the jewish state. *NGO Monitor*, 10ss: https://ngo-monitor.org/reports/apartheid-report/ Accessed on 18.09.2025.

Khalaf, R. (17 March 2017). To resign. In a letter she referred to pressure from "powerful member states" accompanied by "vicious attacks and threats", cf. Senior U.N. official quits after "apartheid" Israel report pulled. *Reuters*: https://www.reuters.com/article/us-un-israel-report-resignation/senior-u-n-official-quits-after-apartheid-israel-report-pulledidUSKBN16O24X Accessed on 18.09.2025.

Khalid, T. (2021). Netanyahu blasts UN settlements censure as denying Jews' "historic" rights, slams US. *Al Arabiya News:* https://english.alarabiya.net/News/middle-east/2023/02/21/Netanyahu-blasts-UN-settlements-censure-as-denying-Jews-historic-rights-slams-US Accessed on 18.09.2025.

Klose, F. (2022). *In the cause of humanity. A history of humanitarian intervention in the long Nineteenth century.* Cambridge University Press, Cambridge.

Klug, T. (2023). Is Israel an Apartheid State? Is Amnesty International Antisemitic?. *Palestine-Israel Journal, 24,* 4ss.

Kontorovich, E. (8 July 2021). The Apartheid Accusation Against Israel is Baseless–and Agenda-Driven. *EJIL: TALK!*: https://www.ejiltalk.org/the-apartheid-accusation-against-israel-lacks-is-baseless-and-agenda-drive Accessed on 18.09.2025.

Koplow, M. (3 February 2022). The Strange Case of Erasing Nationalism From a National Conflict, *Israel Policy Forum: Koplow Column:* https://israelpolicyforum.org/2022/02/03/the-strange-case-of-erasing-nationalism-from-a-national-conflict Accessed on 18.09.2025.

Kremnitzer, M. (20 July 2018). Jewish Nation-state Law Makes Discrimination in Israel Constitutional. *Haaretz:* https://www.haaretz.com/israel-news/2018-07-20/ty-article/.premium/nation-state-law-makes-discrimination-in-israel-constitutional/0000017f-db7b-df62-a9ff-dfff281b0000 Accessed on 18.09.2025.

Kretzmer, D. (2023). The "Constitutional Reform" and the Occupation. *Israel Law Review, 56,* 397, 406-407.

Kretzmer, D., Ronen, Y. (2021). *The occupation of justice.* Oxford University Press, Oxford.

Liakopoulos, D. (2019a). Rough justice: Anatomy and interpretation in the exclusion of individual criminal liability in

international criminal justice. *Revista do Curso de Direito do UNIFOR,* 10(1), 148-233.

Liakopoulos, D. (2019b). Justicia dura: anatomia e interpretaciòn en la exclusiòn de la responsabilidad penal individual en la justicia penal internacional. *Revista Eletrònica de Estudios Penales y de la Seguridad*, 4.

Liakopoulos, D. (2020a). *The role of not party in the trial before the International Court of Justice.* ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2020b). *Complicity of States in the international illicit.* ed. Maklu, Antwerp, Portland.

Liakopoulos, D. (2020c). *Complicity in international law.* W.B. Sheridan Law Books, ed. Academica Press, Washington, London.

Liakopoulos, D. (2020d). *The role of customs in international law.* W.B. Sheridan Law Books, ed. Academica Press, Washington, London.

Liakopoulos, D. (2022). The Palestinian question and the ICC. *Research Journal Public Security and Public Order,* 30, 61-76.

Liakopoulos, D. (2024a). *The role of Prosecutor in the function of accusation in International Criminal Court,* Eliva Press, Republic of Moldova.

Liakopoulos, D. (2024b). Jus ad bellum rules, non-state actors and use of force between Palestine and Israel. *Ius Inter Gentes-*

Revista de Derecho y Relaciones Internacionales, 5, 39-59.

Liel, A. (2022). Comparable to South Africa?. *Palestine-Israel Journal, 27*, 4ss.

Lingaas, C. (2015). The Crime Against Humanity of Apartheid in a Post-Apartheid World. *Oslo Law Review, 2*, 86, 105ss.

Lingaas, C. (2015b) The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law. *International Criminal Law Review, 15*, 485, 515 (2015).

Lingaas, C. (2019). *The concept of race in international criminal law.* Routledge, London, New York, 234ss.

Lingaas, C. (6 July 2021). Jewish Israeli and Palestinians as Distinct 'Racial Groups' Within the Meaning of the Crime of Apartheid?, *EJIL: Talk!:* https://www.ejiltalk.org/jewish-israeli-and-palestinians-as-distinct-racial-groups-within-the-meaning-of-the-crime-of-apartheid Accessed on 18.09.2025.

Lynk, M. (16 May 2018). Prolonged Occupation or Illegal Occupant?, *EJIL:TALK!*: https://www.ejiltalk.org/prolonged-occupation-or-illegal-occupant. Accessed on 18.09.2025.

Mackenzie, J. (17 June 2024). Netanyahu disbands war cabinet as pressure grows on Israel's northern border. *Reuters:* https://www.reuters.com/world/middle-east/netanyahu-disbands-his-inner-war-cabinet-israeli-official-says-2024-06-17 Accessed on 18.09.2025.

Magid, J. (July 2024). Knesset votes overwhelmingly against

Palestinian statehood, days before PM's US trip. *Times Israel:* https://www.timesofisrael.com/knesset-votes-overwhelmingly-against-palestinian-statehood-days-before-pms-us-trip Accessed on 18.09.2025.

McDermott, Y. (2024). *Proving international crimes.* Oxford University Press, Oxford.

Megiddo, T., Levine-Schnur, R., Berda, Y. (9 February 2023). Israel is Annexing the West Bank. Don't be Misled by its Gaslighting. *Just Security*: https://www.justsecurity.org/85093/israel-is-annexing-the-west-bank-dont-be-misled-by-its-gaslighting Accessed on 18.09.2025.

Mendel, M. (8 February 2022). Eine Einladung zur Selbstzerstörung. *Zeit Online:* https://www.zeit.de/kultur/2022-02/amnesty-international-israel-apartheidstaat Accessed on 18.09.2025.

Mettraux, G. (2020). International Crimes: Law and Practice: vol. II: Crimes against humanity. Oxford University Press, Oxford, 738-741ss.

Odeh, M. (2022). How Far is Israel From Being an Apartheid State?. *Palestine-Israel Journal, 27*, 20ss.

Ohlin, J.D. (2007). Group Think: The Law of Conspiracy and Collective Reason. *Journal of Criminal Law & Criminology, 98,* 147, 155-57, 194-95 (2007).

Palestine Liberation Organization. Negotiation Affairs Department. (2021). *Its is aparthedi: The reality of israel's colonial occupation of Palestine*. https://www.nad.ps/sites/default/files/20201230.pdf Accessed on 18.09.2025.

Policy Working Group, (2022). Recognizing and Ending Israeli Apartheid. *Palestine-Israel Journal, 27,* 4ss.

Power, S. (20 December 2022). UN General Assembly Committee Adopts Resolution Requesting Second Advisory Opinion from ICJ on Occupied Palestinian Territory. *EJIL:TALK!:* https://www.ejiltalk.org/un-general-assembly-committee-adopts-resolution-requesting-second-advisory-opinion-from-icj-on-occupied-palestinian-territory Accessed on 18.09.2025.

Puppe, I. (2022). Vorsatz und überschießende Innentendenzen. *Juristen Zeitung, 77,* 454-458.

Quigley, J. (1991). Apartheid Outside Africa: The Case of Israel. *Indiana International & Comparative Law Review, 2,* 222ss.

Raday, F. (2022). Amnesty's Distorted Framing of an Evolving Tragedy. *Palestine-Israel Journal, 27,* 1, 4-6.

Renno, T. (2021). Circumstantial Evidence. *Max Planck Ecncyclopedia of International Procedural Law.* 24-27.

Reynolds, J. (2023). Apartheid and International Law in Palestine. In N. Kiswanson, S. Power, *Prolonged occupation and international law.* ed. Brill, Bruxelles.

Roberts, P. (2022). R*oberts and Zuckerman's criminal evidence.* Oxford University Press, Oxford, 121ss.

Robinson, D., Vasiliev, S., Van Sliedregt, E., Oosterveld, V. (2024). An Introduction to International Criminal Law and Procedure. Cambridge University Press, Cambridge.

Ronen, Y. (2017). Taking the Settlements to the ICC? Substantive Issues. *American Journal of International Law Unbound, 111,* 57-60.

Sadi Jaber, S., Bantekas, I. (2023). The Status of Gaza as Occupied Territory under International Law. *International & Comaprative Law Quarterly, 72,* 1069, 1081ss.

Sayegh, F. (2012). Zionist Colonialism in Palestine. *Settler Colonial Studies, 2,* 208ss.

Sfard, M. (2021). The Occupation of the West Bank and the Crime of Apartheid. *Legal Opinion, 57*, 5ss.

Shany, Y. (2005). Faraway So Close: The Legal Status of Gaza after Israel's Disengagement. *Yearbook of International Humanitarian Law, 8,* 369, 384ss.

Thornberry, P. (2016). *International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary,* Oxford University Press, Oxford, 481-482.

Tomuschat, C. (1995). Crimes against the Peace and Security of Mankind and the Recalcitrant Third State. *Israel on Human Rights, 24,* 75, 213, 247ss.

Van Den Herik, L., Braga da Silva, R. (2022). Article 7. In K. Ambos, *Rome Statute of the International Criminal Court. Article by article commentary.* Oxford University Press, Oxford, 186ss.

Waxman, D. (2023). Israel, Amnesty, and the Apartheid Accusation: A Wake-Up Call. *Palestine-Israel Journal, 27 (1 & 2),* 5ss.

Werle, G., Jessberger, F. (2020). *Principles of international criminal law*. Oxford University Press, Oxford.

Williams, G., Baker, D. (2024). *Treatise of criminal law.* LexisNexis, New York, Par. 3.10.

Zilbershats, Y. (2013). Apartheid, International Law, and the Occupied Palestinian Territory: A Reply to John Dugard and John Reynolds. *European Journal of International Law, 24*, 917ss.